An Honest Day’s Work: Day Labor Advocacy in the United States

By Rebecca Smith

Generally hired for the duration of a particular job, day laborers are employed in many sectors, including landscaping, construction, manufacturing, domestic, and service. Day labor is not a new phenomenon in the United States. Recently the downturn in the economy has resulted in a growing number of workers turning to day labor as their only viable employment option. Whether seeking work informally on urban and suburban corners or through temporary labor agencies, day laborers continue to make significant contributions to the economy.1 One large day labor company, Labor Ready Inc., having expanded its chain of day labor halls from 17 offices in 1993 to over 730 in 2000, recently claimed to be the largest supplier of manual labor in the United States.2

A flexible pool of workers for employers, day laborers are commonly subject to egregious workplace exploitation. Day laborers are often assigned to the dangerous tasks shunned by workers with more options. As a result, they face a high incidence of workplace injuries and fatalities.

Because day labor often accords a subsistence-level (or lower) income, day labor and the homeless population overlap in many locations across the country. One-third of day laborers interviewed in a New York study said that they were homeless.3 In New Mexico fully 75 percent of day laborers working for temporary agencies said they were homeless.4 Studies in Arizona, Cleveland, and Chicago have focused entirely on the homeless day labor population.5

These and other studies and anecdotal evidence show pervasive wage and hour violations committed by day labor employers and temporary labor agencies. Day labor employers often delay payments of promised wages until the completion of a job. Upon completion, day laborers are commonly left with less than promised or a void check. Lack of access to social and legal services that could assist in enforcing workplace rights leave few options for day laborers seeking to recover unpaid wages.

As immigrants and activists across the country have confronted the issues faced on the job by day laborers, they have developed a series of strategies to advance workplace rights. These include participatory research projects that survey day laborers and report on their demographics and labor conditions; local, state, and federal-level legislation to combat these abuses; litigation; and the emergence of nonprofit

1The terms “temp agency,” “day labor agency,” “temporary agency,” and “labor broker” are used interchangeably in this article to describe for-profit entities that hire workers to perform work for a third-party or work-site employer.
4Southwest Center for Economic Integrity, Brokered & Street Corner Day Labor in New Mexico (April 2004), at www.economicintegrity.org/NM_Day Labor_Data_Summary.pdf.
Day labor centers that fulfill a variety of functions, from organizing for workplace equity and conducting English as a Second Language and other classes to becoming a gathering place for a community of immigrant workers. In this article I draw a portrait of the day labor workforce from city- and state-based surveys of day laborers themselves. I then discuss strategies employed by day laborers to advance their workplace rights.

I. Portrait of a Workforce: The Day Labor Surveys

The size of the day labor workforce in the United States is difficult to estimate. According to the Bureau of Labor Statistics, 1.2 million workers worked for a temporary service agency in 2001. That survey represents, at once, an overcount and an undercount of the day laborers because it includes all workers who worked for staffing agencies, whether in day labor or not, but excludes day laborers who do not find work through a broker. Data from the U.S. Census Bureau’s Current Population Survey Contingent Work Supplement, generally believed to undercount day laborers grossly, indicates that on average 260,000 day laborers per month were at work in the United States in 2001. Labor Ready, the self-described largest employer of day labor in the country, indicates that in 2001 it employed 700,000 day laborers across the country.6

Because standard surveys employed by the federal government undercount these workers, substantial resources have been placed into surveying day laborers themselves in a participatory research model. Recent surveys of day laborers in Southern California, New York, Cleveland, Chicago, Arizona, and New Mexico generally involved interviews with day laborers at locations such as street corners, homeless shelters, and outside home improvement stores. Surveys in California, New York, and New Mexico focused on immigrant day laborers. The Chicago, Cleveland, and Arizona surveys focused on homeless day laborers. Surveyors employed volunteers and sometimes day laborers themselves to conduct the survey. The surveys give a picture of the work experiences and demographics of day laborers in the U.S. and have been used as tools to advance policy changes that benefit day laborers.

A. Demographics of Day Laborers

Day laborers interviewed for the surveys were overwhelmingly from immigrant communities. In the California study 97 percent of those interviewed came from Mexico and Central America. Likewise in New York 97 percent of the respondents were immigrants. Just under half (42 percent) of street-corner day laborers in Albuquerque were born in the United States, while 54 percent were

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7Id.


9Each study was conducted in a slightly different way. In Southern California a survey of 481 day laborers was conducted at 87 different sites in Los Angeles and Orange County, including locations tied to a home improvement store or nursery and street-corner gathering places. Abel Valenzuela Jr., Day Laborers in Southern California: Preliminary Findings from the Day Labor Survey (May 30, 1999), at www.nelp.org/hwp/initiatives/dayresearchandresources.cfm. The New York survey involved interviews of 290 workers at 29 different sites throughout metropolitan New York and Long Island. Valenzuela & Melendez, supra note 3. The Cleveland study interviewed 77 people over a four-month period in 2001 in soup kitchens and homeless shelters as part of an effort to support the establishment of a community hiring hall. Kerr & Dole, supra note 5. In Albuquerque 172 day laborers were interviewed at soup kitchens, shelters, and on street corners. Two surveys were used: one for brokered labor and the other for street-corner workers. Southwest Center for Economic Integrity, supra note 4. The Tucson study interviewed 126 homeless day laborers and focused on the state of day labor and the workers’ awareness of their legal rights following passage of the Arizona Day Labor Practices Bill in 2001. Smith, supra note 5. The Chicago study was a survey of 510 homeless men and women on one night in October 1999. Theodore, supra note 5.

10Valenzuela, supra note 9, at 7.

11Valenzuela & Melendez, supra note 3, at 12.
born in Mexico. In Chicago and Cleveland, where the focus of the surveys was on the homeless, a majority of day laborers were native-born African Americans, with substantial numbers of Latino workers as well. Although in all surveys day laborers tended overwhelmingly to be men, the New York study found that 5 percent were women.

B. Working Conditions of Day Laborers

Whether measured by the hour, day, week, or month, day laborer earnings are extremely low across the country. The Chicago study, focusing primarily on homeless day laborers, found that 82 percent were paid an hourly wage of $5.50 or less and that nearly two-thirds of the respondents (64.5 percent) were earning less than the federal minimum wage of $5.15 an hour. The study concluded that if a day laborer earning minimum wage were to work steadily and somehow managed to avoid the seasonal downturns of the industry, the worker would still earn less than $9,000 a year. The Los Angeles/Orange County study found that the average monthly wage for a day laborer in Los Angeles during months with good weather and plentiful work was $1,000, but monthly wages plummeted to $350 during the off season. In Tucson the average hourly pay for day laborers was $5.45 per hour, but only $3.87 per hour after deductions were made. In Cleveland daily pay was generally between $28 and $35.

The studies show that day laborers are often not paid at all for their labor. The short nature of the employment relationship, multiple barriers to enforcement resources, and the lack of strong protective wage and hour laws render day laborers particularly vulnerable to nonpayment of wages. All surveys of day laborers show a high incidence of abuse, in particular nonpayment of wages, not being paid a promised wage, bounced checks, abandonment at the work site, or not being provided with food or water, and not being allowed any breaks. Table 1 shows particular types of abuses complained of by workers in different surveys and the percentage of workers surveyed who had suffered a particular type of abuse. In the New York and California studies, these percentages indicate those who said that this abuse happened to them from one to five times.

Table 1.—Abuses Identified by Day Laborers

<table>
<thead>
<tr>
<th>Abuses</th>
<th>New York</th>
<th>California</th>
<th>Chicago</th>
<th>Cleveland</th>
<th>New Mexico</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unpaid wages</td>
<td>45.5</td>
<td>41.3</td>
<td>16.4</td>
<td>*</td>
<td>24</td>
</tr>
<tr>
<td>Job injury</td>
<td>10</td>
<td>10</td>
<td>10</td>
<td>50</td>
<td>20</td>
</tr>
<tr>
<td>Not paid promised wage</td>
<td>49.1</td>
<td>38.7</td>
<td>58</td>
<td>40</td>
<td>50</td>
</tr>
<tr>
<td>Race discrimination</td>
<td>17.8</td>
<td>24</td>
<td>24</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Retaliation</td>
<td>23.8</td>
<td>48.1</td>
<td>24</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Abandoned at work site</td>
<td>32</td>
<td>27</td>
<td>27</td>
<td></td>
<td></td>
</tr>
<tr>
<td>No food or water</td>
<td>42.8</td>
<td>37.3</td>
<td>31**</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*Blank indicates that the particular question was not asked.
**The question was about “no food, water, or breaks.”

Day laborers working for temp agencies or other labor brokers report significant “wait times” from when they report to work to when they are dispatched to a job. Generally workers employed by temp agencies are hired through a “first come, first served” system, which means wait times are exacer-

12Southwest Center for Economic Integrity, supra note 4, at 7.
13Kerr & Dole, supra note 5, at 12; Theodore, supra note 5, at 21.
14Valenzuela & Melendez, supra note 3, at 6.
15Theodore, supra note 5, at 2.
16Id. at 5.
17Valenzuela, supra note 9, at 11.
18Smith, supra note 5, at 10.
19Kerr & Dole, supra note 5, at 13.
bated. Competition for work also results in favoritism by dispatchers. In the Chicago study 79 percent of day laborers interviewed said that they reported for work between 4:00 a.m. and 6:00 a.m., but 48 percent said that they waited between 1.5 and 2.5 hours for their actual paid work to begin. In Tucson the study reported an average “wait time” of 2.1 hours. In Albuquerque day laborers working for a labor broker reported wait time averaging over two hours as well.

Even when day laborers are paid as promised, various lawful and unlawful deductions can undercut the value of the promised hourly rate. Temporary day labor agencies and other day labor employers commonly deduct the costs of meals, transportation, and cashing of payroll checks. After numerous deductions, the day laborer is often earning less than the federal minimum wage. Labor Ready made $4.8 million in 1999—roughly 20 percent of its net income—from the check-cashing machines in its day labor halls, which subtract a little over a dollar from workers’ pay vouchers.

In most surveys, immigrants indicated that their work was concentrated in a few construction-related industries. Table 2 displays the results from three surveys.

Immigrants in general, those in the construction trades in particular, have very high accident rates in the United States. Day laborers often toil under hazardous conditions without the benefit of health and safety training or equipment. Day laborers may have no advance warning about possible exposure to hazardous materials or dangerous tasks. Desperate

Table 2.—Industries Employing Day Laborers

<table>
<thead>
<tr>
<th>INDUSTRY</th>
<th>CHICAGO</th>
</tr>
</thead>
<tbody>
<tr>
<td>Light Industrial/Factory</td>
<td>33.9</td>
</tr>
<tr>
<td>Loading and Unloading</td>
<td>47.5</td>
</tr>
<tr>
<td>Construction</td>
<td>4.2</td>
</tr>
<tr>
<td>Landscaping</td>
<td>.6</td>
</tr>
<tr>
<td>Kitchen Work</td>
<td>3.1</td>
</tr>
<tr>
<td>Janitorial</td>
<td>6.1</td>
</tr>
<tr>
<td>Mechanic</td>
<td>4.7</td>
</tr>
</tbody>
</table>

Industries in Which Workers Indicated that They Had a Specialization

<table>
<thead>
<tr>
<th>INDUSTRY</th>
<th>NEW YORK</th>
<th>CALIFORNIA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Construction</td>
<td>39.2</td>
<td>82.6</td>
</tr>
<tr>
<td>Landscaping</td>
<td>27.9</td>
<td>59.7</td>
</tr>
<tr>
<td>Mechanic</td>
<td>5.6</td>
<td>13.5</td>
</tr>
<tr>
<td>Plumbing</td>
<td>15.8</td>
<td>24.3</td>
</tr>
<tr>
<td>Carpentry</td>
<td>14.0</td>
<td>41.3</td>
</tr>
<tr>
<td>Painting</td>
<td>29.4</td>
<td>70.8</td>
</tr>
</tbody>
</table>

20 Respondents to the Tucson survey said that the key to getting good job assignments was to have a good relationship with the dispatcher and that such a relationship was more important than either transportation or arriving early. Bartley & Roberts, supra note 2, at 11–12.

21 Theodore, supra note 5, at 12.

22 Smith, supra note 5, at 8.

23 Southwest Center for Economic Integrity, supra note 4, at 4.

for work and fearing retaliation, day laborers often risk life and limb without ever reporting work hazards. Data collection techniques and the Occupational Safety and Health Administration’s targeted enforcement priorities make it difficult both to identify accident rates and to protect day laborers.  

In Cleveland over 70 percent of day laborers reported that they were worried about their health and safety on the job. In New Mexico 41 percent of day laborers had these worries. The Chicago day labor study found that nearly half of the respondents (46 percent) were concerned about health and safety, yet only 56 percent reported their concerns to the temp agency or on-site employer. The belief that no corrective action would be taken and that temp agencies and employers would refuse future employment prevented reporting. These fears are valid. The same study found that when day laborers actually reported health and safety concerns, employers took corrective action in only 11 percent of the cases. Further, nearly one in four Chicago day laborers reporting health and safety concerns was terminated or not reassigned to future jobs. 

In many of the survey responses, day laborers overwhelmingly stated that they preferred full-time permanent employment to day labor in the following percentages: New York, 81 percent; Chicago, 95.6 percent; Tucson, 89 percent; Albuquerque, 86 percent. These data, collected from surveys of workers themselves, can help identify strategies for advocates for litigation, legislation, and the establishment of worker centers that address day laborers’ needs and help them combat rampant exploitation.

II. Challenges in Enforcement of Workplace Rights and How to Meet Them

Day laborers, like many other workers in the United States, are protected by federal and state employment laws that govern wage and hour conditions, workplace health and safety, and the right to workplace organizing. The Fair Labor Standards Act protects the wage and hour rights of most day laborers. Generally the Act provides for payment of at least the federal minimum wage for the first forty hours worked in a workweek, overtime pay of time and one-half pay for time worked over forty hours in a workweek, restrictions on child labor, and maintenance of employment records. The Act covers all employers and employees engaged in interstate commerce or in the production of goods for commerce and employers with annual gross sales or business volume of at least $500,000. The Occupational Safety and Health Act has workplace health and safety protection provisions and authorizes the U.S. Department of Labor’s Occupational Safety and Health Administration (OSHA) to adopt workplace health and safety regulations. Employers are responsible for meeting these guidelines to ensure healthful and safe work

25 WORKER PROTECTION, supra note 6, at 13–17.
26 Kert & Dole, supra note 5, at 20.
27 Southwest Center for Economic Integrity, supra note 4, at 4.
28 Theodore, supra note 5, at 16.
29 id. at 17.
30 id.
31 Smith, supra note 5, at 10; Southwest Center for Economic Integrity, supra note 4, at 6; Theodore, supra note 5, at 22; Valenzuela & Melendez, supra note 3, at 16.
33 id. §§ 203(l), 206, 207(a)(2)(C), 211(c).
34 id. § 203(c)(1).
Day Labor Advocacy

and work conditions. The National Labor Relations Act prohibits employers from engaging in unfair labor practices against employees and unions seeking to organize them and requires employers to bargain in good faith with organized workers over the terms and conditions of their employment.\footnote{National Labor Relations Act, 29 U.S.C. §§ 151–169 (2004).}

Many day laborers fall within OSHA’s jurisdiction. However, the General Accounting Office found that the Labor Department’s efforts to enforce the protection provisions for day laborers were hampered by the department’s data collection methods, by the fleeting nature of day labor employment, by complaint-driven enforcement techniques, and by confusion over legal issues surrounding wage deductions and identification of the “employer” as between a temporary service agency and a work-site employer.\footnote{WORKER PROTECTION, supra note 6, at 3.} For example, in theory the complaint process that drives enforcement of the Occupational Safety and Health Act and the Fair Labor Standards Act makes it possible for any employee to report a health and safety violation.\footnote{Id. at 14.} In practice, employee fear of retaliation and the short-term nature of day labor have defied effective OSHA monitoring of day labor work sites. Further, the General Accounting Office reports that where OSHA conducts industry monitoring, due to limited resources, it generally does not target the smaller work sites where many day laborers are employed.\footnote{Id. at 17.}

The Labor Department’s Wage and Hour Division is similarly challenged in enforcing wage and hour laws. The General Accounting Office found that since 70 percent of the Wage and Hour Division’s enforcement activity is complaint-driven, its targeted enforcement is based on data unreported in a cash-based system of labor, and because it does not target the construction industry as a likely violator of wage-hour laws, day laborers often go unprotected.\footnote{Id. at 14–17.} Yet the Labor Department believes that temp agencies are frequent violators of wage-hour laws. Problem issues identified by day laborers in the surveys, such as excessive and potentially illegal deductions from wages, go undetected.\footnote{See infra III.B for a description of litigation in this area. A full discussion of the federal law, regulations, and case law on waiting time and illegal deductions is beyond the scope of this article but is available from the National Employment Law Project. E.g., DAY LABORERS’ RIGHTS UNDER FEDERAL LAW: WAITING TIME AND DEDUCTIONS FROM WAGES (April 2002), available at www.nelp.org/docUploads/pub134.pdf; see also Rick McHugh, Recognizing Wage and Hour Issues on Behalf of Low-Income Workers, 35 CLEARINGHOUSE REVIEW 289 (Sept.–Oct. 2001).}

State employment and labor laws may have broader protection provisions for day laborers. Some state laws provide for workplace wage and hour protection to workers of employers not covered by the Fair Labor Standards Act and a minimum wage higher than the federal minimum, or otherwise fill in gaps in the federal law by providing for daily overtime or guaranteed rest breaks. Within the health and safety context, states such as California have adopted workplace requirements that are more stringent than those delineated by OSHA and that clearly extend to and delineate responsibility for work-site safety beyond the temp agency to the work-site employer as well.\footnote{E.g., CAL. LAB. CODE § 6400 (West 2004); CALIFORNIA DIVISION OF OCCUPATIONAL SAFETY AND HEALTH, POLICY AND PROCEDURES MANUAL, MULTI-EMPLOYER WORKSITE INSPECTIONS (2000), available at www.dir.ca.gov/doshpol/p%26pc%2D1c.htm.}

State laws govern the administration of workers’ compensation benefits for day laborers suffering injury arising out of or in the course of their employment. These laws sometimes exempt day laborers employed by homeowners. For instance, over 40 percent of the day laborers interviewed in the Southern California study would be excluded because they are doing
work “in and around a home.”\(^{43}\) Other state laws exempt employers of small numbers of workers and may therefore exclude day laborers who are injured on the job.

While many day laborers are in fact covered by the aforementioned federal and state labor and employment laws, courts and the various federal and local agencies charged with enforcing these laws are often confused, and they wrongly exclude day laborers from coverage under protective laws. The General Accounting Office reports a lack of uniformity among the state wage-and-hour divisions charged with enforcing the laws as to the extent of coverage for day laborers.\(^{44}\) Day laborers and other contingent workers are an integral part of the workforce and should not be excluded from employment and labor law protection provisions because of their contingent employment status. Legislative protection means nothing without adequate enforcement.

III. Strategies to Protect and Advance the Workplace Rights of Day Laborers

As they have confronted the issues that day laborers face on the job, immigrants and activists have developed a number of strategies to protect and advance workplace rights. The development of day labor centers, litigation, and legislation are among these strategies.

A. Day Labor Centers: An Emerging Voice for Immigrant Workers

Day laborers are often faced with the unsavory choice of working for day labor agencies or seeking work at street corners. Agencies may force workers into excessive wait times, pay them low wages from which many deductions are made, and subject them to the whims of the dispatcher. Day laborers who congregate at street corner shape-up sites may face the same low wages, increased risk of uncompensated injuries, and the prospect of little or no recourse if wages go unpaid.

All over the country, day labor hiring sites are being opened and operated by not-for-profit community-based organizations working closely with day laborers. In the past decade the number of “worker centers,” whether operated for day laborers or other workers, has increased from fewer than 5 worker centers nationwide in 1992 to at least 130 worker centers, of which about 25 percent are day labor centers, in over 80 U.S. cities, towns, and rural areas.\(^{45}\)

Day labor centers offer a safe place for day laborers and employers to negotiate terms of employment. There day laborers can be reached to inform them of workplace rights and means of enforcement. And there workers can obtain the skills and education they need, and activists can organize around public policy issues important to day laborers.

CASA de Maryland is one example of a day labor center that plays many roles in the community.\(^{46}\) The center placed workers in almost 6,000 jobs during the 2002–2003 fiscal year and actively seeks partnerships with area employers to provide quality labor for full-time and part-time positions.\(^{47}\) Its workers receive English language classes, industry-specific skills training, and computer skills training. It also organizes region-based day laborer committees, which elect worker directivas. These directivas then participate in the design and management of advocacy campaigns chosen by the workers. Current advocacy includes a driver’s license campaign, the opening of a worker center in Prince Georges County, and a campaign to pass a new low-wage worker law in Maryland.\(^{48}\)

\(^{43}\)Valenzuela, supra note 9, at 14.

\(^{44}\)WORKER PROTECTION, supra note 6, at 21.


\(^{46}\)For information on this day labor center, see www.casademaryland.org.

\(^{47}\)See www.casademaryland.org/Employment_md.htm.

\(^{48}\)E-mail from Kim Propeack, CASA de Maryland, to Rebecca Smith, National Employment Law Project (June 24, 2004) (on file with Rebecca Smith).
The immediate benefits provided by a day labor center that operates a hiring hall include increased wages. According to one report, laborers who worked through nonprofit hiring halls earned around 70 cents more per hour in real wages than those who worked through a labor intermediary. Also, nonprofit entities attempt to minimize wait time by matching workers to jobs on the spot.

Many day labor centers offer social, educational, and cultural services. Some offer free food and clothing to their members, some offer health clinics, and some include cultural activities (music and plays or sports activities such as soccer leagues). Many connect immigrant day laborers with services such as housing, health care, and legal representation for immigration and other issues.

Day labor centers that offer legal services in-house have been instrumental in enforcing the legal rights of day laborers. In particular, they have been extremely successful in winning unpaid wages for workers. For instance, CASA de Maryland recovered over $200,000 in back wages for day laborers in 2001. The day labor center CASA Latina (Centro de Ayuda Solidaria a los Amigos) in Seattle sponsored a joint project with the King County Bar Association to recruit and train volunteer lawyers to assist day laborers in recovering back wages. Primavera day labor center in Phoenix was instrumental in litigation that returned $150,000 to the pockets of day laborers illegally charged for check-cashing by Labor Ready. Day labor centers in the San Francisco Bay area and Southern California have aggressively protected the First Amendment rights of day laborers to solicit work on street corners.

Nonprofit day labor centers can protect workers who want to bring legal claims against abusive temp agencies without suffering retaliation. In Baltimore four major temp agencies employ homeless day laborers. The Homeless Persons Representation Project has had a very difficult time getting clients to litigate the apparent illegal practices by these agencies because day laborers who assert their rights are added to a troublemakers’ list shared among employers; the day laborers then cannot obtain subsequent jobs. At nonprofit day labor centers, by contrast, people who litigate against their employers are celebrated and identified as heroes.

Day labor centers usually operate with a small staff on a small budget comprising membership dues, grants, and some government funding. The Coalition for Humane Immigrant and Refugee Rights of Los Angeles employed an innovative funding strategy: Home Depot financed the day labor center as a condition of receiving its permit to build.

In 2000 the National Day Laborer Organizing Network was founded as a way to connect day labor centers around the country. The network is a collaborative effort of eighteen community-based organizations that organize day laborers in different parts of the country. Its mission is to strengthen and expand the work of local day laborer organizing groups in order to become more effective and strategic in building leadership, advance
Day Labor Advocacy

Advocating for low-wage workers and immigrant rights, and developing successful models for organizing immigrant contingent or temporary workers. Its present program includes work on immigration reform, creation and strengthening of worker centers, education, and organization and promotion of day laborers’ civil rights. The network promotes day labor centers based on the criteria that centers must be visible, accessible, and in close proximity to where day laborers originally congregated; that they must promote real participation of the workers; and that worker centers should not be run as temp agencies.

Another network of day labor groups (including members of the National Day Laborer Organizing Network) is the North American Alliance for Fair Employment. The alliance is a network of organizations that serve a broad range of constituencies affected by problems associated with nonstandard work, such as part-time, temporary, and contract employment. The alliance and its members work for equal treatment (pay, benefits, and protection under the law) regardless of employment status. Its work is part of the broader fight to ensure that working people have the right and opportunity to provide for themselves, their families, and their communities. The alliance has a number of working groups; one of the most active is the temp and day labor group.

B. Litigating Day Laborer Rights

Much of the litigation surrounding day labor has been focused on wage-and-hour issues and antisolicitation ordinances enacted in various cities across the country.

Wage-and-Hour Litigation. Deductions from wages, pay for overtime, wait time and transportation time, and check-cashing charges have been the focus of wage-and-hour litigation. Most litigation in the wage-and-hour area has been brought against labor brokers, a surprising amount of it against a single day labor agency. As noted in the surveys, day laborers may often suffer long waiting times and extensive paycheck deductions that violate federal law. After workers at a day labor agency or labor hall are assigned jobs for the day, transporting them to the work site to begin working may take some time. Day laborers often receive no pay for time spent waiting after they receive a job assignment and for time spent in transit from the work hall to the job site. Key issues in such situations are whether day laborers are entitled (1) to be paid for time spent waiting between their arrival at the work hall or pickup site and receiving a work assignment; (2) to be paid for time spent waiting between receiving a work assignment and beginning to work; (3) to be paid for time spent waiting for a paycheck at the end of the day; and (4) to be paid for time spent waiting if they must report to the day labor agency on a daily basis even after they receive a lengthy assignment. Another problem for day laborers is that employers often deduct from their pay the cost of transportation between the work hall or pickup location and the work site and for other expenses including safety equipment, meals, and cashing of checks. Key issues in these situations are whether such deductions are legal and, if so, what deductions are reasonable.

Many of the waiting-time issues have been litigated in contexts other than day labor. and the Labor Department has issued extensive regulations on the subject. Some case law specific to day labor has also developed. In Preston v. Settle Down Enterprises a temp agency referring workers for construction and other jobs moved for summary judgment on the plaintiffs’ claims for compensation for waiting time and certain transportation time. The court denied summary judgment and sent the issues to the jury, including the question of whether the temp agency was obligated to pay workers for their waiting time between generation of a work ticket and the arrival of the company-provided transportation to the work site. The court found as well that if

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58For information on the North American Alliance for Fair Employment, see www.fairjobs.org.

Day Labor Advocacy workers were required to report to a particular place to receive instructions, that time would be compensable. The court said that any time postemployment during which workers were required to return to the temp agency offices for the benefit of the employer would also be compensable.\(^\text{60}\)

The New Hampshire Supreme Court ruled in 2002 that a day labor agency’s practice of automatically deducting $4 from the pay of each worker per day for transportation fees violated New Hampshire law. However, the court found that the labor agency had overstepped its statutory authority in assessing wage adjustments of over $140,000 since no employee of the agency had formally filed a claim.\(^\text{61}\)

**Deduction Litigation.** A worker’s pay can be made up of wages and other benefits. In some circumstances an employer may legally deduct from a worker’s wages. The general rule under federal law is that deductions are permitted as long as they do not bring the hourly cash pay below the federal minimum wage. However, state laws can protect against deductions more strongly. New York State, for instance, presumes that any paycheck deduction is illegal.\(^\text{62}\)

Key issues in this area involve deductions from wages for transportation (generally allowed unless transportation is part of and necessary to the employment), essential tools and safety equipment (generally for the benefit or convenience of the employer and not deductible if required to perform safely the work asked of the worker), meals (generally considered to be for the benefit or convenience of the employee so that the “reasonable cost” may be deducted), and fees for check cashing.

Labor Ready recently agreed to reimburse check-cashing fees to workers in response to a complaint brought by the Arizona attorney general.\(^\text{63}\) The complaint was brought under Arizona’s Consumer Fraud Act, which the state argued barred any employer from collecting any fee to cash a paycheck. The agreement calls for $150,000 to be paid to workers who paid the fee between July 18, 2000, and December 6, 2002. Labor Ready must post notices of the agreement in English and Spanish, and money not claimed will be distributed to four nonprofit entities.\(^\text{64}\) In a similar case in New York the New York Industrial Board of Appeals chided Labor Ready for "extracting what is, relative to their daily wages, an extravagant amount of money to cash their vouchers," yet held that Labor Ready did not violate the law.\(^\text{65}\) The case against Labor Ready was filed by the New York State labor commissioner. The appeals board said that using Labor Ready’s check-cashing machines was a separate and voluntary transaction and that no evidence was presented that workers were pressured to use the machines.\(^\text{66}\)

In **Labor Ready Northeast v. McConaghy** a Rhode Island court found that Labor Ready was not operating an unlawful check-cashing business because the

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\(^\text{64}\) Id.

\(^\text{65}\) Id.

\(^\text{66}\) Id. Labor Ready’s check-cashing fees are also being litigated in Georgia and California, and Massachusetts has ordered Labor Ready to stop charging for check cashing. Christopher D. Cook, *Street Corner, Incorporated*, MOTHER JONES, March–April 2002, at 65–69, available at www.motherjones.com/news/feature/200203/street_inc.html.
Day Labor Advocacy

vouchers issued to workers for payment were not “negotiable instruments” within the meaning of Rhode Island law.67

Procedural Barriers to Litigating Day Laborer Rights. Employers, including temporary agencies, increasingly are requiring workers to sign arbitration agreements to arbitrate any abuses alleged against the employer. This means that workers desperate for a job are required to give up their day in court and the potential to litigate claims as a class action.68 In 1997 a federal court in California struck such an agreement as unconscionable because it required the worker to give up the right to a jury trial but did not make the same provision for the employer.69 But in 2004 a New York state court allowed questions about unlawful deductions to be submitted to arbitration as a class action and held that arbitrability of the issues in the first instance was for the arbitrator to decide.70 In 2002 the Fourth Circuit also sent claims of unpaid overtime, waiting time, travel time, and training time to arbitration.71

Antisolicitation Ordinance Litigation. A continuing threat to street-corner day laborers is ordinances that severely restrict their opportunities to secure work and in many cases criminalize their efforts to do so. In the last few years more than a dozen cities and counties in Southern California have enacted ordinances that prohibit or restrict day laborers’ right to solicit work from public sidewalks and parking lots.72 An ordinance enacted in Austin, Texas, makes it illegal to solicit work from a pedestrian from an automobile or for a pedestrian to solicit someone in a vehicle.73 A Dade County, Florida, ordinance penalizes those who pick up laborers.74

Plaintiffs have filed lawsuits challenging these ordinances, and activists have waged successful campaigns to prevent proposed ordinances from being enacted. In a lawsuit the Mexican American Legal Defense and Educational Fund challenged the City of Los Angeles’ ordinance prohibiting day laborers and employers from soliciting employment on public property.75 According to news reports, a federal judge struck down the ordinance in 2000.76 Suits filed against the California cities of Los Altos, Upland, and Rancho Cucamonga resulted in settlements, and those cities agreed to cease barring day laborers on public sidewalks from soliciting employment.77 On May 19, 2004, the fund filed a federal court lawsuit against the City of Glendale on behalf of the National Day Laborer Organizing Network and the Comite de Jornaleros de Glendale, an association of day laborers who seek work in the city. The lawsuit challenges Glendale ordinance 9.17.030—which bars day laborers from soliciting work—as a violation of the First Amendment right of free speech. The case also alleges that Glendale police officers infringe day laborers’ speech rights by rousting them from public sidewalks.78

68 The Supreme Court concluded in Circuit City Stores Inc. v. Adams, 532 U.S. 105 (2001), that arbitration clauses in general were enforceable in employment contracts but left open the possibility that such arbitration clauses could still be subject to challenge under state contract law.
71 Adkins v. Labor Ready Inc., 303 F.3d 496 (4th Cir. 2002).
73 Austin, Tex., Ordinance 990722-65.
74 Dade County, Fla., Ordinance 93-105, §§ 1–3, 10–19.
76 Id.
77 Id.
78 Id.
C. Legislation

While most state and federal employment and labor laws apply to day laborers, the short-term nature of the work, complex rules and circumstances around deductions from wages and compensable time, and the multiple entities involved in the employment relationship call for legislative reforms addressing the specific needs of day laborers.

At the federal level U.S. Rep. Luis Gutierrez introduced the Day Labor Fairness and Protection Act in 2003. This comprehensive bill addresses joint liability of labor brokers and work-site employers, protects and expands the wage-and-hour rights of day laborers, ensures a safe and healthy workplace, and imposes disclosure and record-keeping requirements on employers. It also guarantees the First Amendment rights of day laborers and protects their right to organize a union on the job. The text of the bill was developed in conjunction with the National Day Labor Organizing Network and in response to the concerns of the network’s members.

At the same time many states and localities have considered revising their laws that specifically address some of the common workplace abuses suffered by day laborers. To date, five states—Arizona, Florida, Georgia, Illinois, and Texas—have adopted statewide legislation affecting the labor rights of day laborers. These laws generally provide for written disclosures of terms and conditions of employment to day laborers, regulate deductions from wages (including for meals, transportation, and check cashing), implement required registration of certain labor brokers, and impose record-keeping requirements on them.

The National Employment Law Project has developed a drafting guide (Drafting Day Labor Legislation: A Guide for Organizers and Advocates) to assist groups in implementing policy changes in their state. For policy advocates and day labor organizers, the guide has step-by-step directions for drafting day labor legislation. Each step discusses principles and the specific elements to advocate in protective day labor legislation. The guide offers model language to propose to policymakers for each of the elements, and the appendix includes a survey of state laws that protect day laborers and regulate day labor agencies.

Some states have passed laws (apart from those specific to day labor) that affect day laborers and enhance their ability to earn a fair day’s pay for a fair day’s work. For example, California, New York, Nevada, and Alaska have all passed daily overtime provisions to compensate workers for excessive hours and to prevent exploitative employer practices. Other states have also enacted legislation—including protection of temps’ rights to unemployment compensation—aimed at the broader temporary agency industry.

A flexible pool of workers for employers, day laborers contribute to the U.S. economy. Yet day laborers are routinely subjected to workplace abuse with little or no recourse. Conducting studies and surveys of the workers, proposing and drafting legislation, filing lawsuits, and developing day labor centers can improve day laborers’ conditions and advance their workplace rights.

80Both a summary and the text of the bill are available at www.nelp.org/nwp/initiatives/day/daylaborbill.cfm.
81ARIZ. REV. STAT. §§ 23-551 et seq. (2004); FLA. STAT. ANN. §§ 448.20 et seq. (West 2004); GA. CODE ANN. §§ 34-10-1 et seq. (2004); 820 ILL. COMP. STAT. 175/1 et seq. (2004); TEX. LAB. CODE ANN. §§ 92.001 et seq. (2004).
82A comparison of the provisions of each of the five laws is available at www.nelp.org/docUploads/State%20DL%20chart%20Appendix%20031704%20pdf.
83The guide is available at www.nelp.org/docUploads/Guide%20to%20Drafting%20Day%20Labor%20Legislation%20030804%20pdf.
84ALASKA STAT. § 3.10.060(2) (Michie 2004); CAL. LAB. CODE § 510 (West 2004); N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.4 (2004).
85A summary of pending state legislation affecting day laborers, updated every few months, is available at www.nelp.org/docUploads/nswlegsum092903%20pdf.